

Constitutional Renewal in Turkey: Some Questions Concerning Constitutional Theory

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Ali Acar Di 14 Mai 2013

Turkey is currently undergoing a process of drafting a new constitution. The lack of legitimacy of the present, 1982, constitution, which was originated from the 1980 military coup d'état, renders adoption of a new constitution necessary in the public opinion. There are high public expectations for the new constitution in terms of assuring democratic standards.

The process for the new constitution officially started on 19th October, 2011. In order to carry out the task of drafting, a parliamentary committee of constitutional reconciliation was established. The committee is composed of an equal number (three) members from each of the four political parties sitting in the current parliament, plus the president of the parliament who serves as the president of the committee. According to the rules of procedure the committee itself adopted, consensus/unanimity is required for each matter to be put into the draft constitution.

Some of the political parties, led by the governing Justice and Democratic Party (AKP), and the (pro-Kurdish) Peace and Democracy Party (BDP), argue that the process should lead to a totally new constitution (here in the technical/constitutional law sense of the term), while others, the Republican People's Party (CHP) and the Nationalist Action Party (MHP), seem to hold the view that the drafting process should be directed toward a large scale constitutional amendment. In other words, the majority of the current composition of the Parliament, represented by AKP, seems to assume to itself the constituent power of a constitutional assembly, even though this claim is dubious from the perspective of the CHP and MHP. Of course, these different opinions will have some important consequences, which I will come below. (By the way, the current composition of the Parliament resulted from the election of June, 2011, held for the regular term of legislative election.)

The said committee seems to now to have reached an impasse, since the consensual/unanimous decision-making rule does not resolve the different and apparently irreconcilable opinions of the political parties, especially on some particular issues. Of them, the Kurdish question and some of the proposals for its solution (such as public education in one's mother tongue and local autonomy), and the form of government (the AKP's insistence on presidential or semi-presidential system) are the most controversial. If the committee fails, the AKP will most probably instigate its own plan to pass the new constitution. It is not very clear at this stage if it would pursue a large scale constitutional amendment or a new constitution in the technical sense. The AKP argues for the latter, but in a perplexed and an unconvincing manner. And this causes some complex questions concerning constitutional theory, to which I will come shortly below.

Since the political impasse is being noticed by the AKP leaders, they now make statements that they will set in motion their Plan B, according to which they will bring their own (new) constitutional proposals, including presidential or semi-presidential system, to the agenda of the Parliament very soon. However, they seem to be confused in answering one question: how will they do that, i.e. how will they adopt the new constitution in the technical sense of the term? The assumption of the constitution-making power in the current Parliament was not, at the beginning of the process, so problematic given the fact that the drafting task was being performed by the constitutional reconciliation committee and consensus was required in the committee. This challenging matter did not bring about a serious discussion, either in the public or in the scholarly debate.

However, if the committee fails and the AKP initiates its own plan, this will be a cause for concern and give rise to confusion with regard to the constituent power of the Parliament. In fact, the AKP is causing this confusion and increasing it by some of its efforts. In this sense, the most important reason of the confusion stems from the

following: as the AKP is aware that, to argue for the adoption of a new constitution in the technical/constitutional law sense, they must somehow argue that the Parliament holds the constituent power. The basis for this argument for them, however, is the amendment mechanism of the present (1982) constitution. It is clearly seen in the statements and efforts of the AKP leaders that they will try to get the minimum votes required for passing constitutional amendments. This is the AKP's confusing and unconvincing justification in asserting to adopt the new constitution.

The amendment mechanism requires at least 330 MPs' affirmative votes (three-fifths majority) out of total 550 votes, and AKP has 325 votes.[1] It seems highly possible that AKP can compromise with BDP to pass the constitutional amendments, as their total votes are enough to do so. However, whether that would mark a new constitution in the technical sense of the term must be carefully considered. The CHP and MHP do not oppose using the amendment mechanism of the 1982 Constitution since they believe that what is being done is a large scale constitutional amendment.

AKP's reliance on the amendment mechanism of the present constitution leads to a serious contradiction in terms of the idea of constituent power. Although the AKP assumes the current Parliament has the constituent power, they rely on an already-existing constitutional rule. However, the very definition of the constituent power suggests that the constituent power does not need, (or to put better, can ignore) any legal basis in adopting a (new) constitution. Otherwise, it will be challenged as to whether it in fact holds the constituent power. Or to put it differently, a power, assuming in itself the constituent power, but nevertheless trying to find a legal basis in an already-existing (constitutional) rule will be hardly coherent and convincing in its assumption. Therefore, the current phase of the AKP's attempt to pass a new constitution brings about an odd or atypical situation to the very idea of constituent power.

The oddness of the AKP's position, however, does not end at this point. What is more bizarre is that AKP is inclined to ignore, in submitting their constitutional proposals, the eternal clauses of the present constitution (the first three articles); they want to change or abandon them. Even though this might seem to be consistent with their own position — namely that the current Parliament has the constituent power — the dependence on the amendment mechanism weakens this position. Furthermore, according to constitutional law literature and also the case-law of the Turkish Constitutional Court, it is not possible to amend the eternal clauses by relying on the amendment mechanism. Furthermore, according to a recent decision by the Turkish Constitutional Court, even Article 4 of the 1982 constitution, which determines the eternal status of the first three articles, cannot be amended. [2] Here, therefore, arises another important challenge awaiting a credible legal argument.

In conclusion, AKP wants to make some fundamental political decisions (in Schmittian terms) in Turkey. However, it appears that they do not know how to do that legitimately. They, while trying to rely on one specific rule (the amendment clause) of the present constitution, ignore other important ones (the eternal clauses). Thus, the following questions need to be answered, both in general constitutional theory and specifically before attempting to pass a new constitution in Turkey:

Can such a complex and bizarre attempt in Turkey in adopting a new constitution be considered as legitimate? Considering that the constituent power does not need any legal foundation to pass a new constitution; thus legality does not have any role to play in the process, then how can it make sense to rely on an already existing constitutional rule? Can the amendment clause of the 1982 constitution be simply considered as a legitimating point in adopting the new constitution, and if so, can it also make it legally possible to ignore the rest of the Constitution? In that case, will this result be considered merely as an apocryphal act of sovereignty (to quote a Schmittian term)? And will that apocryphal act of sovereignty need to be upheld by an express public support, i.e. referendum? If not, will that constitution be considered as a democratic one? In passing, it is relevant to state that recently some of the AKP leaders suggest that if they get more than 367 affirmative votes (see footnote 2) in adopting the new constitution, it may not be put into the referendum; and this will in line with the current constitution. Thus again, if such an end result (the new constitution) is not sent to the referendum, will that be a new democratic constitution? Can the simple assumption of the constituent power be enough to adopt the new constitution? Does it not need to be supported by

an express public opinion, or is a tacit one enough? Is there any other way to adopt a new constitution in a relatively well-functioning democratic system out of a way which comes about democratically and for the specific purpose of constitution-making, i.e. by a constituent assembly established by free and equal suffrage and for the specific purpose of constitution-making? These questions need to be considered and answered in the process undergoing in Turkey. On the other hand, if the AKP can accomplish its goal of passing the new constitution, do constitutional lawyers (and political theorists) need to re-consider the concept of constituent power, or maybe abandon or replace it with something else; Hart's rule of recognition or some modified version of it, maybe?

I am aware that I have not offered any answer to these questions. This is simply because I do not have any, yet. But at the same time, it is in fact difficult to have answers in the middle of the constitution-making process going on in Turkey, as it is still ambiguous what the process will turn out to be. Yet, those questions, I believe, are worth thinking about. I wanted to share these initial questions and concerns, as they might be interesting to the international academic world, and to get some useful feedback.

[1] According to the amendment mechanism (Art. 175), if a constitutional amendment is passed by three-fifths, but less than two-thirds majority (367 votes), the President shall send it to the referendum or send it back to the Parliament for re-consideration. If a constitutional amendment is passed in the first place, by more than two-thirds majority, the President can either accept and signed it into law or send it to the referendum or send it to the Parliament for re-consideration. In the first case i.e. the adoption of a constitutional amendment by three-fifths majority, the referendum is obligatory, whereas in the second (adoption by the two-thirds majority) it depends on The President's discretion. If a constitutional amendment sent back by the President to the parliament for re-consideration is adopted again (and this time can be adopted only) by 367 votes, this time the President shall sign it into law or can send it to the referendum.

[2] File No: 20080/16, Decision No: 2008/116, published in the Official Gazette on October, 22, 2008.

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